

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Price Cap Performance Review for)
Local Exchange Carriers)

CC Docket No. 94-1

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EX PARTE COMMENTS OF TIME WARNER COMMUNICATIONS

Time Warner Communications ("Time Warner")¹ respectfully submits these ex parte comments in response to the Commission's Public Notice dated January 24, 1995 seeking public comment on the ex parte filing submitted on January 18, 1995 by the United States Telephone Association ("USTA"), a national association representing local exchange carriers ("LECs").

As demonstrated below, USTA's amended proposal should not be entertained by the Commission. The new proposal does not address the specific deficiencies raised by the parties earlier in this proceeding; relies upon new data and new approaches without providing a rationale for these divergences; and compromises the extensive record already developed in this proceeding.

USTA's modified proposal fails to cure one of the most fundamental flaws in its original filing: the unwarranted expansion of pricing flexibility before there is any concrete

¹ Time Warner's corporate name is "Time Warner Communications Holdings, Inc."

evidence of local exchange service competition. The danger of allowing the LECs to preempt competitive entry through pricing maneuvers was discussed in detail in Time Warner's Comments in this proceeding.² In the modified proposal, USTA suggests that full consideration of its original pricing flexibility proposal be deferred to a separate and later proceeding. However, a closer reading of USTA's ex parte filing reveals that USTA is not, in fact, willing to let go of its ambitions regarding pricing flexibility, in the interest of allowing a fuller consideration and debate. While USTA proposes to defer the portion of original proposal involving the classification of market areas, the excessive pricing flexibility criticized by Time Warner and many other parties still persists through a wide variety of mechanisms identified at pages 1 to 3 of Appendix B to USTA's filing. In fact, USTA is asking the Commission to proceed at once to entrust the LECs with a very substantial measure of the pricing flexibility.

USTA's modified proposal also relies on new data and new approaches that were only just now made available for critical analysis. Although the pretense for offering new productivity data is to "update" previously filed information, a preliminary review of these data indicates significant discrepancies between the inputs originally relied on by USTA's experts and those now used to justify its modified position. Uncertain of its chances of convincing the Commission to adopt the low productivity offset proposed in its original filing, USTA has revised its numbers and possibly its methodology, outside the realm of public scrutiny. The Commission should not overlook the key linkage between the pricing flexibility aspects of USTA's proposal and its newly-concocted productivity factor that is subject to revision on an annual basis. As the LECs increasingly (and selectively) price

² See initial Comments of Time Warner, CC Dkt. No. 94-1, filed May 9, 1994.

services at off-tariff rates, the rate changes that are reported for purposes of determining the change in LEC outputs (i.e., primarily those for services remaining under tariffed price controls) will reflect a significant upward bias relative to LEC prices overall.³ This unrepresentative sampling of industry prices will cause the change in outputs within the calculation of Total Factor Productivity to be *understated*, which, in turn, will artificially suppress the value calculated for Total Factor Productivity. Not surprisingly, the beneficiaries of this bias are the LECs themselves, since a lower TFP translates into a higher price cap for services that remain subject to the formula and, thus, higher prices for the LECs' noncompetitive services.

Rather than devoting their imaginations and resources to obtaining premature pricing flexibility, the LECs would better spend their energies on facilitating competitive entry through the elimination of barriers to market entry. Thus, Time Warner recommends that the Commission establish, as a *threshold requirement* for further consideration of pricing flexibility, that any LEC proposing to obtain such pricing flexibility demonstrate that it has tariffs *in place and fully operational* that, at a minimum, provide for unbundling of the LEC's network, access to numbering resources, inter-carrier compensation (at rates set at long run incremental cost) for calls terminating on other networks, access to directory assistance databases, and number portability. These actions will speak far louder than words about the LECs' commitment to competition. When the LECs have taken these threshold

³ The effect would be similar in nature to that presently ongoing with the CPI toll index, as noted by the Commission: "CPI toll indexes do not reflect the lower average charges that result as customers shift to discount plans." *Reference Book: Rates, Price Indexes, and Household Expenditures for Telephone Service*, p. 108, FCC, Common Carrier Bureau, Industry Analysis Division, May 1993.

steps, Time Warner will be willing to agree that further consideration of pricing flexibility is then due.

By suggesting that the only controversial aspect of its pricing involves the determination of competitive market areas, USTA attempts to divert attention from a recognition that excessive pricing flexibility is pervasive within its price cap proposal. Time Warner agrees that issues of pricing flexibility are better deferred until a later time, but not simply for procedural reasons. Additional pricing flexibility is simply not warranted under present market conditions, including the persistence of barriers to market entry that the LECs have the power, largely, if not exclusively, to either perpetuate or remove. Thus, the Commission should defer *all*, not just a selected subset, of the pricing flexibility issues and allow interested parties to address them in a comprehensive and inclusive public forum.

Finally, from a procedural standpoint, the USTA "modified proposal" is entirely inappropriate at this stage in the instant proceeding. After releasing a comprehensive and detailed Notice of Proposed Rulemaking nearly a year ago, the Commission afforded parties a period of four and half months to develop and present their positions.⁴ Virtually every major telecommunications industry interest was represented in the extensive comments and reply comments that were filed in response to the detailed questions raised in the Commission's Notice. Many of those comments contained extensive critical analysis of the premises underlying the USTA pricing flexibility proposal, the USTA-sponsored productivity recommendations (and underlying studies), and other aspects of the USTA proposal that

⁴ See *In the Matter of Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Notice of Proposed Rulemaking, released February 16, 1994 (FCC 94-10) ("Notice").

would have removed effective regulatory constraints on the LECs' as-yet largely noncompetitive services.

Now, at the eleventh hour in a proceeding which has been extensively briefed, USTA is modifying its original position, and, in effect, asking the Commission--and the industry--to put aside the extensive record which has been developed in this proceeding. USTA's modified position apparently has not been served upon the parties of record in this proceeding (and under 47 C.F.R. §§ 1.1200-1.1216, need not be). The new proposal was placed on public notice on January 24, 1995 with ex parte comments due on an expedited basis in a mere seven days. At the very least, accepting USTA's modified position at this late stage will undoubtedly compromise the record which exists in this proceeding.

USTA's filing also should not be entertained since it operates to disadvantage the other parties in this proceeding. In short, USTA's filing is a tactical maneuver. USTA's submission is essentially late-filed comments in response to the Commission's Notice. As indicated above, participants in this proceeding previously addressed USTA's position, contributing to the extensive record which has emerged. By amending its position at this late stage through the ex parte process, after the issues have been before the Commission for consideration, USTA is clearly seeking to avert a full and careful consideration of its proposal. Such a step, if allowed by the Commission, may compromise the due process rights of the parties in this proceeding.

For the reasons set forth above, USTA's proposal should be rejected by the Commission.

Respectfully submitted,



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January 31, 1995

CERTIFICATE OF SERVICE

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I, Teresa Griffiths-Randolph, an employee of LeBoeuf, Lamb, ~~Conner &~~ 1995
MacRae L.L.P., hereby certify that copies of the foregoing ~~ex parte~~ ^{FEDERAL COMMUNICATIONS COMMISSION} ~~Comments~~ ^{OFFICE OF SECRETARY}
Warner Communications were served by first-class mail, postage prepaid, this 31st day of
January, 1995 upon all parties of record in CC Dkt. No. 94-1.


Teresa Griffiths-Randolph